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In The

# Supreme Court of the United States

October Term, 1983

RUSSELL THOMAS PALMER, JR.,

*Cross-Petitioner*

versus

TED S. HUDSON,

*Cross-Respondent.*

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CROSS-PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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## QUESTIONS PRESENTED

I.

**Does the intentional deprivation of property by an official abuse of power constitute a due process violation notwithstanding the existence of state remedies?**

II.

**Does the intentional deprivation of property by an official abuse of power constitute a due process violation when state relief is uncertain?**

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## OPINIONS BELOW

The opinion of the United States District Court for the Western District of Virginia is unreported and is included as Appendix A to the Petition for Writ of Certiorari. The opinion of the Court of Appeals is as yet unreported and is included as Appendix B to the Petition for Writ of Certiorari.

## JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered January 6, 1983. Cross-Respondent filed a Petition for Writ of Certiorari which was received on April 6, 1983. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). Cross-Petitioner relies upon Rule 19.5 of the Rules of the Supreme Court of the United States.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, which provides, in pertinent part:

> ...[N]or shall any State deprive any person of life, liberty, or property, without due process of law; ...

This case also involves Title 42 U.S.C. §1983, which provides, in pertinent part:

> Every person who, under color of any statute, ... , custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured ...

## STATEMENT OF THE CASE

On September 28, 1981, Plaintiff Palmer, Cross-Petitioner herein, brought a *pro se* §1983 suit against Defendant Hudson, Cross-Respondent herein, who is a guard at the Bland Correctional Center. Plaintiff alleged that he was subjected to destructive, ransacking searches by Defendant for no purpose other than to harass and that during such searches noncontraband property belonging to Plaintiff was destroyed. Plaintiff further alleged other forms of harassment by Defendant Hudson.

On November 17, 1981, the United States District Court for the Western District of Virginia entered summary judgment against Plaintiff, ruling that the allegations, if true, did not state a constitutional deprivation.

Plaintiff timely appealed to the Fourth Circuit Court of Appeals. On January 6, 1983, the Court of Appeals held that, while the allegations did state a possible Fourth Amendment violation, the intentional taking and destruction of property was governed by this Court's decision in *Parratt v. Taylor* and that there was no due process violation.

## REASONS FOR GRANTING WRIT OF CERTIORARI

### I.

### *PARRATT V. TAYLOR* WAS MISAPPLIED TO THIS CASE INVOLVING INTENTIONAL, ABUSIVE DEPRIVATION OF PROPERTY BY AN OFFICIAL.

In *Parratt v. Taylor*, 451 U.S. 527 (1981), this Court addressed the question of whether or not an accidental deprivation of property by a state official constitutes a due process violation when a state court provides a postdeprivation remedy as by suit for tort. Similar to the reasoning of the earlier case of *Baker v. McCollan*, 443 U.S. 137 (1979), where this Court addressed negligent deprivations of liberty, this Court's plurality *Parratt* opinion held that such official negligence does not rise to the level of a due process violation where a state court provides a suitable postdeprivation remedy.

In the present case, Plaintiff Palmer alleged willful, malicious destruction of his property by a prison guard as a means of harassment and an abuse of power. The Fourth Circuit Court of Appeals decided that the *Parratt* holding applied to intentional deprivations as claimed by Palmer. However, for the reasons set forth below, the Court of Appeals misapplied *Parratt* to the present case.

#### A. *A deprivation caused by an official abuse of power is a due process violation notwithstanding theoretical state court remedies.*

As noted in several separate opinions to the *Parratt* decision, *Parratt* did not present an intentional deprivation of property. While the rationales of the opinions differed slightly as to why intentional deprivations can be distinguished from negligent losses, one primary principle lies at the core of each: The Fourteenth Amendment and the civil rights acts are intended to prevent abuses of power above all. Where an official's wrongful taking of property is not a mistake but intentional, such action takes on the characteristics of state procedure, the imprimatur of the state. Such officials "carry a badge of authority of a State and

represent it in some capacity whether they act in accordance with their authority or misuse it." *Monroe v. Pape*, 365 U.S. 167, 172 (1961); *cf. Lugar v. Edmundson Oil Co.*, ___ U.S. ___, 73 L.Ed.2d 482, 495 (1982) (recognizing the same principle under its analysis of state action). Moreover, as an intentional act it can more meaningfully be prevented. *Parratt, supra*, at 546 (Blackmun, J., concurring).

It is no new notion that abuses of power are at the very heart of the civil rights acts. *Monroe v. Pape, supra*, says as much. *Id.* at 172; *cf. Screws v. United States*, 325 U.S. 91, 109 (1945) (plurality opinion) (discussing criminal counterpart of §1983). More recently, in *Briscoe v. Lahue*, ___ U.S. ___, 75 L.Ed.2d 96 (1983), this Court had occasion to recognize again that 42 U.S.C. §1983 is "a section designed to provide remedies for abuses under color of law." *Id.* at ___, 75 L.Ed.2d at 111. This notion has wound, often subtly, throughout many of the civil rights decisions of this Court, serving as an often silent beacon for treatment of civil rights issues and application of the civil rights statutes. *See Paul v. Davis*, 424 U.S. 693 (1976). Thus, deprivation as a result of an intentional abuse of power has reasonably contrasted with simple negligent, accidental deprivation. *See Parratt v. Taylor*, 451 U.S. 527 (1981); *Baker v. McCollan*, 443 U.S. 137 (1979).

Five years before *Parratt*, for example, this Court decided *Paul v. Davis, supra*. The majority held that the case involved simple defamation, not a constitutional violation. The dissent speculated that the majority was simply fearful of transforming negligent torts into §1983 violations. *Id.* at 717. But, as the dissent pointed out, such concern in "groundless" because "[t]he essential element of this type of §1983 action is *abuse* of [one's] *official position.*" *Id.* (Brennan, J., joined by Marshall and White, JJ., dissenting) (emphasis in original).

This abuse of power concept thus anticipated *Baker v. McCollan, supra*, and *Parratt v. Taylor, supra*, in both of which cases intentional deprivation was similarly recognized in separate

opinions as distinguishable. In *Baker v. McCollan*, Mr. Justice Blackmun, writing separately, emphasized the lack of evidence of intent by the sheriff and on that basis concurred. Three Justices dissented because the case involved at least reckless abuse of power.[1]

In *Parratt*, Mr. Justice Powell addressed the abuse of power concept perhaps most overtly, stating, "[Section 1983] was enacted to deter real *abuses* by state officials in the exercise of governmental powers." 451 U.S. at 549 (Powell, J., concurring) (emphasis in original). In expounding on this point, Mr. Justice Powell explained, "Actionable deprivations must be based on misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed wit the authority of state law." *Id.* at 552 n. 10 (quotations omitted). This is so because the Constitution protects against deprivations "by a state officer *who takes* [ ] *by abuse of his office and its power.*" *Id.* (quoting *Screws v. United States*, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring)) (emphasis by Powell, J.).

It is consistent with the fundamental nature of the abuse of power concept that four Justices wrote separately in *Parratt v. Taylor* to emphasize the distinction between the facts of that case and an intentional deprivation. Yet the Fourth Circuit Court of Appeals, together with a number of other Circuits since *Parratt*, has failed to recognize this fundamental distinction. *See, e.g., Rutledge v. Arizona Board of Regents*, 660 F.2d 1345 (9th Cir. 1981), *aff'd sub nom Kush v. Rutledge*, ___ U.S. ___, 51 U.S.L.W. 4356 (1983); *Gilday v. Boone*, 657 F.2d 1 (1st Cir. 1981). *But see, e.g., Brewer v. Blackwell*, 692 F.2d 387 (5th Cir. 1982); *Weiss v. Lehman*, 676 F.2d 1320 (9th Cir. 1982). Focusing

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[1] This Court has, of course, recognized that such an abuse of power can be found in a state procedure which violates due process as well as in an action by an official who abuses his authority. *See Lugar v. Edmondson Oil Co.*, ___ U.S. ___, 73 L.Ed.2d 482 (1982); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). As reflected in the dissenting opinions in *Baker v. McCollan*, 443 U.S. 137, the two concepts can merge into one where the procedure is a matter of faulty practice by an official such as a sheriff.

instead on the "random and unauthorized acts" notion in *Parratt*, the Fourth Circuit reasoned below that, because intentional abuses of power are also random and unauthorized in some sense, they too follow the *Parratt* analysis, and the question turns to the existence of a state remedy. However, while it is true that systematic but deficient state procedures can violate due process, *see, e.g., Lugar v. Edmundson Oil Co., supra,* so can the isolated abuse of official power, *see Monroe v. Pape,* 365 U.S. 167 (1961). The Fourth Circuit's analysis overlooks the fact that many of the types of civil rights violations targeted by Congress in the passage of the civil rights acts were no doubt equally random, isolated, and unauthorized. A sheriff's direction to a posse to lynch a black man would be considered random and unauthorized. But a theoretical state court postdeprivation remedy would make it no less a civil rights violation, and no less the type of act which the civil rights acts were most clearly designed to prevent.

In the present case, Plaintiff has alleged an intentional, abusive taking of property. Such allegation of abuse of power states a due process claim and the Court of Appeals decision was in error.

B. *The intentional deprivation of property by a prison guard in Virginia constitutes a due process violation because Virginia provides no certain postdeprivation remedy.*

Even if the holding of *Parratt v. Taylor,* 451 U.S. 527 (1981), does apply to an intentional, abusive, official taking of property, it would not apply to the facts of this case. This Court, in *Parratt*, held that negligent loss by an official does not in and of itself constitute a due process violation. Concluding that no predeprivation hearing could be expected in connection with an accidental loss, this Court turned its attention to whether reasonable postdeprivation relief was provided by the State of Nebraska. That question was answered in the affirmative and, as a result, this Court held that no due process violation was involved in the facts of *Parratt*.

Unlike the State of Nebraska, however, Virginia does not provide a reliable postdeprivation remedy. Virginia's civil law is still heavily infested with large pockets of immunity often barring relief and sheltering abuses by officials from the light of accountability. Scylla and Charybdis hardly presented greater navigational obstacles than Virginia's immunity decisions present to many litigants attempting to chart a path between "ministerial" and "discretionary" on their journey to postdeprivation relief. *Compare First Virginia Bank-Colonial v. Baker, Clerk*, 225 Va. ____, 225 V.R.R. 62 (1983), *with Banks v. Sellers*, 224 Va. ____, 224 V.R.R. 152 (1982), *with James v. Jane*, 221 Va. 43 (1980), *with Lawhorne v. Harlan*, 214 Va. 405 (1973). At the least, the law is unsettled. As a result, there is no certain postdeprivation remedy against official deprivation *in fact* in Virginia. The holding in *Parratt v. Taylor, supra*, accordingly, does not apply to this case.

II.

## LOWER COURTS ARE IN NEED OF GUIDANCE FROM THIS COURT IN THE APPLICATION OF *PARRATT V. TAYLOR*.

The lower federal courts have given this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), fundamentally varying application. *Parratt's* holding has been interpreted as applying to intentional as well as negligent deprivations of life, liberty, and property, *see Rutledge v. Arizona Board of Regents*, 660 F.2d 1345 (9th Cir. 1981), *aff'd sub nom Kush v. Rutledge*, ____ U.S. ____, 51 U.S.L.W. 4356 (1983); as applying to intentional as well as negligent deprivations of property, *see Gilday v. Boone*, 657 F.2d 1 (1st Cir. 1981); as applying to negligent taking of property but not intentional taking of property, *see Wright v. Dallas County Sheriff Dept.*, 660 F.2d 623 (5th Cir. 1981); as applying to negligent taking of property but not life, *see Madyun v. Thompson* 657 F.2d 868 (7th Cir. 1981); as applying only to negligent taking of property and when in the presence of an adequate state remedy, *see Hirst v. Gertzen*, 676 F.2d 1252 (9th Cir. 1982), and

as applying only to negligent taking of property and only in the presence of an adequate state remedy and only if a predeprivation hearing is shown to have been impractical, *see Weiss v. Lehman*, 676 F.2d 1320 (9th Cir. 1982).

Application of the decision has divided the Circuits. *Compare Gilday v. Boone*, 675 F.2d 1 (1st Cir. 1981), *and Palmer v. Hudson*, ____ F.2d ____ (4th Cir. 1983), *with Weiss v. Lehman*, 676 F.2d 1320 (9th Cir. 1982), *and Brewer v. Blackwell*, 692 F.2d 387 (5th Cir. 1982).

It has also resulted in inconsistent opinions within the Circuits themselves. *Compare Weiss v. Lehman*, 676 F.2d 1320 (9th Cir. 1982), *with Rutledge v. Arizona Board of Regents*, 660 F. 2d 1345 (9th Cir. 1981), and *Flower Cab Co. v. Petitte*, 685 F.2d 192 (7th Cir. 1982), *with Evans v. City of Chicago*, 689 F.2d 1286 (7th Cir. 1982).

Because of the unquestionable importance of Congress' civil rights acts and their correct and complete usage, federal courts are in need of guidance as to the extent of this Court's opinion in *Parratt* so that it can be applied with consistency.

## CONCLUSION

For the reasons set forth above, Cross-Petitioner urges this Court to grant the Writ of Certiorari and to reverse this holding of the Court of Appeals.

Respectfully submitted,

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